1981

Laverne Robertson, Darlene Olsen and Eldon M. Johnson v. Thora J. Campbell : Brief of Defendant-Respondnet

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF

LAVERNE ROBERTSON,)
DARLENE OLSEN and)
ELDON M. JOHNSON,)
)
Plaintiffs-Appellants,)
)
vs.) Case
)
THORA CAMPBELL,)
)
Defendant-Respondent.)

BRIEF OF DEFENDANT-

Appeal from the
Third Judicial
Salt Lake
Honorable Ernest

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IN THE SUPREME COURT OF THE STATE OF UTAH

LAVERNE ROBERTSON, DARLENE OLSEN and ELDON M. JOHNSON, Plaintiffs-Appellants, vs. THORA J. CAMPBELL, Defendant-Respondent.	)	Case No. 17504

BRIEF OF DEFENDANT-RESPONDENT

Appeal from the Judgment of the
Third Judicial District Court of
Salt Lake County, State of Utah,
Honorable Ernest F. Baldwin, Jr., Judge

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NATURE OF THE CASE

This is an action to set aside a trust agreement on the grounds of mental incompetence of the trustor, fraud, and/or undue influence exercised by defendant-respondent Thora J. Campbell.

DISPOSITION BELOW

At the conclusion of plaintiffs' evidence, the trial judge, the Honorable Ernest F. Baldwin, Jr., granted defendant's Motion to Dismiss.

RELIEF SOUGHT ON APPEAL

Defendant-respondent seeks affirmance of the decision below.

STATEMENT OF MATERIAL FACTS

Respondent controverts the "Statement of Facts" contained in appellants' Brief in almost all respects, as said statement is in essence an argument of the evidence. The facts material to this action are as follows:

In August of 1970, Marinus Johnson (father of the parties to this action) consulted attorneys at the firm of Fabian & Clendenin with respect to estate planning. [R. 206]. Mr. Johnson eventually executed a will and trust prepared by Mssrs. William Vogel and George D. Melling, Jr., attorneys at Fabian & Clendenin. The trust was executed on March 5, 1971.

It named his daughter, Thora J. Campbell, Trustee. By the terms of the trust, $2,500 was to go to Mr. Johnson's son, Eldon, certain real and personal property was to go to Thora, and the remainder of the trust estate was to be divided in four shares, one to daughter LaVerne, one to daughter Darlene, and two to Thora. [Plaintiff's Exhibit 1].

The terms of the trust were carefully explained to Mr. Johnson by Mr. Melling at the time of its execution. [R. 241. Both Mr. Melling and Mr. Vogel testified that Mr. Johnson appear to be completely competent to execute the trust and that there was no evidence that he did not know what he was doing or was being unduly influenced by anyone. [R. 216, 247].

During the four years subsequent to execution of the trust and prior to his death in 1975, Mr. Johnson acknowledged and ratified the existence and validity of the trust. He conveyed several parcels of real property into the trust, assigned into it real estate contracts, and signed and filed trust tax returns. All of these documents and transactions referred to the trust and to the trustee, Thora J. Campbell. [Trial Exhibits 2-10, 29, 31, 32, 45].

ARGUMENT

As Judge Baldwin stated in granting defendant's Motion to Dismiss, plaintiff did not present "one iota" of evidence

to substantiate their case. As trier of fact in an equitable action, Judge Baldwin's decision may be reversed only if the evidence strongly preponderates against it or if he abused his discretion. Plaintiffs failed to make out a prima facie case, as the presumption that might have aided them was obliterated by the testimony of their own witnesses.

The decision in a prior case dealing with related will documents is not res judicta of the issues presented to the trial court in the instant action. Furthermore, examination of the record in both actions makes it patently clear that Judge Baldwin's decision was correct and should be affirmed.

I. THE TRIAL COURT'S DECISION MUST BE AFFIRMED UNLESS MANIFESTLY IN ERROR

The issues tried in this action were equitable in nature. Article VIII, §9 of the Constitution of the State of Utah grants this Court the power to review questions of fact and law in equity actions. That standard of review has been defined and refined by this Court in several cases. The Court has consistently held that, while review may be made of the factual record below, the trial court's findings of fact and decisions must be given tremendous weight. Thus, it has variously been held that the trial court's findings must stand unless the evidence so clearly preponderates against them that

the result constitutes a manifest injustice, Hatch v. Bastian, 567 P.2d 1100 (Utah 1977), or the evidence clearly preponderates against the lower court's findings, Porto v. Nicolo, 495 P.2d 811 (Utah 1972), or the findings are clearly erroneous, Nunley v. Walker, 369 P.2d 117 (Utah 1962). This Court has also stated that in reviewing the lower court's decision, it must be kept in mind that the trial judge had the advantage of hearing and seeing the witnesses. Barker v. Dunham, 342 P.2d 867 (Utah 1959)

II. ANY PRESUMPTION OF UNFAIRNESS OR UNDUE INFLUENCE WAS CONTRADICTED AND ELIMINATED BY PLAINTIFFS' OWN EVIDENCE

Plaintiffs have placed enormous reliance upon a presumption used in the case of Johnson v. Johnson, 337 P.2d 420 (Utah 1959) to establish their prime facie case of undue influence. The rule as stated therein is that when a confidential relationship is established and a gift or conveyance is made to the party in a superior position, a presumption arises that the transaction was unfair. Id. at 422. Plaintiffs argue that they established the presumption by introducing evidence of dealings between Marinus Johnson and his daughter Thora, and that the burden of persuasion shifted to the defendant to overcome the presumption.

Assuming for the purposes of argument that the presumption of unfairness indeed arose in the course of plaintiffs'

case, the issue upon appeal becomes whether that presumption mandated presentation of evidence by the defendant. The answer is clearly no. The testimony of plaintiffs' own witnesses totally contradicted any presumption that might have arisen. As such, the presumption disappeared and plaintiffs were left without any basis for a prima facie case.

As this Court has explained in the past, a presumption of the type discussed in the Johnson case is one of law. Presumptions of law are rebuttable, and disappear from the case when evidence to contradict them, sufficient to amount to some evidence, is presented. Wyatt v. Baughman, 239 P.2d 193 (Utah 1951). (Emphasis the Court's).

It may be the usual case that rebuttal testimony comes from the case put on by the party seeking to rebut the presumption. If the contradictory testimony comes from the witnesses called on behalf of the party who seeks to rely on the presumption, the presumption will be eliminated. In The Colorado & Utah Coal Company, 369 P.2d 796 (Colo. 1962), the Supreme Court stated, citing prior California decisions:

> No party can claim the right of a presumption against his own admission under oath. [Cite omitted]. The force of a presumption is exhausted when a fact which is wholly irreconcilable with it is proved by the uncontradicted testimony of the party relying on it . . .

Id. at 799.

In Tice v. Kaiser Co., Inc., 226 P.2d 624 (Cal. App. 195 the plaintiff sought to rely upon a presumption that the decease had exercised due care. The presumption had arisen during the presentation of the case, but the plaintiff went on and called a witnesses the workmen who had seen the subject accident and who testified as to the conduct of the deceased. The California cou ruled that the presumption had disappeared:

> In order to be entitled to such a presumption, the party relying upon it must first establish a sphere or field within which the presumption may operate. . . The disputable presumption that a decedent exercises due care is dispelled, has no probative value, and disappears from the case when the litigant relying upon the presumption introduces evidence contrary to the fact presumed.

Id. at 629.

As will be discussed infra, while plaintiffs' evidence in this instant case may have given rise to the presumption (i.e. Thora Campbell was a business advisor to her father and received more property than her siblings), there was not one shred of evidence to support a claim of fraud, undue influence, or incompetence. Quite to the contrary, plaintiffs' own witnesse produced convincing and consistent evidence that Marinus Johnson knew exactly what he was doing when he executed his trust. Judge Baldwin had no reason to require defendant to put on testimony that would only be duplicative and cumulative of that presented by plaintiffs. The presumption of unfairness had long since bee

obliterated by plaintiffs' witnesses, and with its demise went plaintiffs' prima facie case.

III. THE EVIDENCE SUPPORTS THE RULING OF THE COURT

Plaintiffs called six witnesses at trial. There was not one bit of evidence that Marinus Johnson was incompetent either in 1971 or thereafter until his death. There was not one bit of evidence that the distribution in his trust was the result of fraud or undue influence. There was not one bit of evidence to contradict the fact that Marinus Johnson knew exactly what he was doing when he left his property in an unequal distribution.

In contrast to the absolute lack of evidence to support plaintiffs' case, the trial court heard the following affirmative testimony supporting the validity of the trust:

William Vogel, an estate specialist with Fabian & Clendenin, testified that he first met Marinus Johnson in August, 1970. Mr. Johnson was accompanied by Thora Campbell. (Incidentally, plaintiffs are in error in their brief wherein they claim Mrs. Campbell denied meeting Vogel. See R. 183). At that conference, several possibilities for distribution of the property were discussed. Plaintiffs infer that Mrs. Campbell was railroading the process because she was doing a lot of the talking at the meeting. What plaintiffs neglect to tell this Court is that Mr. Vogel testified her comments were in response

to inquiries into the details of Mr. Johnson's properties. [R. 216 and 226].

Mr. Vogel sent out a draft trust that provided for equal distribution to the three sisters. In their brief, plaintiffs would leave this Court with the erroneous impression that the distribution had been decided upon by Mr. Johnson. Again plaintiffs ignore the testimony of Mr. Vogel: the distribution in the draft was an arbitrary election by Vogel made only for the purpose of getting a draft instrument to Mr. Johnson. [R. 218].

Even more seriously misleading is plaintiffs' total failure to refer to Mr. Vogel's testimony as to the capacity of Mr. Johnson and the circumstances surrounding the execution of the trust. First, Mr. Vogel testified that he would take particular care when doing an estate for an elderly person. [R. 220]. He was fully satisfied that Marinus Johnson understood what he was doing. [R. 221]. Further, he increased his usual precautions in light of the unequal distribution of the estate. [R. 221]. Finally, he testified [R.222]:

> Q All right. Was there anything that was going on, anything that you observed that led you to believe or suspect that Marinus Johnson was not doing what he wanted to do but, rather was being coerced or was being unduly influenced by Thora Campbell?
>
> A There is nothing that led me to suspect

that Thora Campbell was unduly influencing him.

Mr. Vogel's partner George D. Melling, Jr. testified. Mr. Melling took over the job of finishing the trust agreement. Plaintiffs ignore Mr. Melling's testimony with respect to the claims at issue in the suit. At the time the trust was executed, Mr. Melling went over the trust page by page with Mr. Johnson. [R. 241]. The trust was revocable, and that provision was pointed out. [R. 245]. Particularly in light of the unequal distribution under the trust, Mr. Melling was sure the terms of the trust were carefully discussed. [R. 246-247]. Like Mr. Vogel, Mr. Melling testified that Marinus Johnson was mentally competent to execute the trust, and that there was no evidence of undue influence. [R. 247].

Alta Johnson had no knowledge of the trust during Mr. Johnson's lifetime. Her only testimony pertinent to the creation of the trust related to the physical and mental condition of Mr. Johnson. She testified that he drove his car until 1973, was not bedridden, often visited his properties in the southern part of Utah, and maintained his social contacts. [R. 295-296].

LaVerne Robertson's testimony never touched on anything other than her husband's education and the fact that she had not lived in Utah for over 35 years.

Plaintiffs' final witness, a grandson named Jeffrey Child, said his grandfather in 1971 made a vague allusion to the fact he would one day get some of the property (which in fact he would under the trust) [R. 307] and that his grandfather was perfectly alert and knew what he was doing. [R. 308].

In light of this testimony, can one possibly conclude that plaintiffs raised even a spectre of mental incompetence, fraud, or undue influence? This case is not akin to Johnson v. Johnson, supra, where the evidence disclosed that the elderly father was senile and did not know what he was doing when he gave his son a great deal of his property. 337 P.2d at 423. In contrast to the situation before the court in the Johnson case, the testimony heard by Judge Baldwin presented a picture of a man who was emphatic in wanting a distribution of his property that was not to be equal to his four children (testimony of William Vogel, R.216), that Mr. Johnson was mentally alert and competent, that the trust was fully explained to him, that he continued to execute documents respecting the trust for four years after its creation, and that during that four year period he was able to handle his affairs.

Judge Baldwin heard all of the testimony and examined all of the exhibits, not just the distorted fragments contained in plaintiffs' brief. The propriety of his decision is best

measured by attempting to answer this question: what evidence presented by plaintiffs was there for defendant to contradict?

IV. THE JUDGMENT IN THE WILL CONTEST IS NOT DISPOSITIVE OF THIS ACTION

Plaintiffs admit in their brief that the prior will contest and the instant case are two separate matters and were properly treated as such. The issues involved in a proceeding probating a will and one challenging the validity of a trust agreement are not at all the same. For one, a trust that might be considered to have been executed while the settlor was being unduly influenced may be subsequently ratified when the settlor regains his free will. Kazaras v. Manufacturers Trust Co., 156 N.Y.S. 2d 275, affd. 164 N.Y.S. 2d 211, affd. 175 N.Y.S. 2d 172 (N.Y. 1956); Vanderlinde v. Bankers Trust Co. of Muskegon, 259 N.W. 337 (Mich. 1935).

It is elementary that relitigation of an issue is barred only if the matter to be foreclosed was actually decided in a prior proceeding. 50 Corpus Juris Secundum, "Judgments" §172(1). While the jury in the prior action found two wills of Mariunus Johnson to have been executed while Mr. Johnson was under undue influence, that was all that was decided. The validity of the trust was not before the jury. Questions of ratification were not even addressed. There is simply no basis for holding that the prior determination is dispositive.

Furthermore, although defendant has chosen not to confuse the issues presented by plaintiffs' appeal by pursuing an appeal of the prior action, the references in plaintiffs' brief to the evidence in the will contest warrant comment. Plaintiffs assert that the testimony in the two trials was the same. Plaintiffs are not correct. For instance, in the first action Mr. Vogel testified that at the 1970 meeting Mrs. Campbell did most of the talking. Nothing further in this regar was elicited from him, and the inference certainly existed that the defendant was directing the provisions of the will and trust. That mistaken inference was disspelled in the trust trial when Mr. Vogel explained that Mrs. Campbell was only giving informati as to the details of her father's properties.

A similar omission in the first trial was that Mr. Vogel was never asked whether Marinus Johnson expressed a desire to change the equal distribution under his 1969 will (which was eventually probated). In the trust action, Mr. Vogel testified that Mr. Johnson was emphatic about reducing his son's share [R. 216]. In the first trial neither of the lawyers was asked his opinion as to the competence or free will of Mr. Johnson. Their testimony in the latter trial was unequiv

In short, the judgment of the jury might seem at odds wi Judge Baldwin's decision, but it is entirely explainable when one considers the additional evidence adduced in the trial of th

trust. And in any event the evidence of ratification makes the jury's determination in the earlier action totally irrelevant.

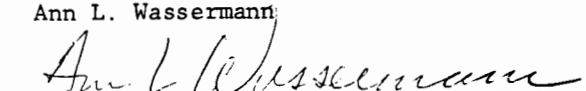
CONCLUSION

Plaintiffs had every opportunity to produce evidence of fraud, undue influence, and mental incompetence. What they came up with were witnesses who testified that Marinus Johnson understood what he was doing, that the attorneys who prepared the trust fully and carefully explained its content and effect to him, and that he participated in the operation of the trust from the date of its execution until his death some four years later. Plaintiffs wholly failed to put into the record any evidence to support their claims. The trial court was entirely correct in sparing the defendant the unnecessary effort of responding to plaintiffs' case, as plaintiffs had already done an effective job of putting on consistent and convincing testimony substantiating defendant's position that the trust of Marinus Johnson was valid in all respects.

For these and all other foregoing reasons, defendant respectfully submits that the Order of Dismissal entered in the court below should be affirmed.

Respectfully submitted this 29th day of June, 1981.

VAN COTT, BAGLEY, CORNWALL & McCARTHY
Ann L. Wassermann



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MAILING CERTIFICATE

THIS IS TO CERTIFY that a true and correct copy of the foregoing Brief of Defendant-Respondent was mailed, postage prepaid, this 29th day of June, 1981, to:

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